

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB BPRS 13-02 Timeshares

SPONSOR(S): Business & Professional Regulation Subcommittee

TIED BILLS: **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|-----------------------------------------------------------------|--------|---------|------------------------------------------|
| Orig. Comm.: Business & Professional Regulation Subcommittee | | Collins | Luczynski |

SUMMARY ANALYSIS

The bill amends ch. 721, F.S., to clarify existing statutory provisions, and to conform the Florida Vacation Plan and Timesharing Act to common industry practices.

Specifically, the bill:

- Exempts timeshare condominiums from the requirements related to condominium board member elections;
- Clarifies that a "timeshare estate" includes both a direct and an indirect interest in a trust;
- Allows timeshare plan reserves to be calculated using the pooling accounting method;
- Includes known current addresses of timeshare plan mortgagors, owners, and/or junior interestholders in the definition of "notice address;"
- Allows the foreclosure trustee to use another country's equivalent of certified, registered mail;
- Eliminates the requirement that a title search be conducted in order to initiate a foreclosure proceeding, and makes a title search a condition to the trustee's exercise of a power of sale;
- Clarifies that no lis pendens is recorded or pending against a timeshare interest unless properly recorded and noticed pursuant to ss. 721.855(5)(h) and 721.856(5)(h), F.S., respectively;
- Eliminates typographical errors;
- Provides a good faith standard in determining whether the obligor is the person who signed the receipt of notice;
- Delineates what information is to be included in the publication notice;
- Clarifies that attestation in a notice affidavit that a diligent search and inquiry was made is only required if a diligent search and inquiry was specifically required to be conducted by the provisions in ch. 721, F.S.;
- Allows for notice to be perfected as to all obligors at the same address, so long as notice is perfected as to at least one obligor at that address;
- Provides a procedure for filing a lis pendens in relation to the initiation of a foreclosure proceeding;
- Allows the trustee to use a third party to conduct the foreclosure sale on behalf of the trustee; and
- Provides that if the trustee, in good faith, makes an incorrect determination as to the identity of the signature on the receipt of notice, then it will not be a violation of law.

The bill has no fiscal impact on state funds.

The bill has an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Condominium Board Election Provisions

Current Situation

Section 718.112(2)(d)4., F.S., provides procedures and rules related to condominium unit owner meetings, specifically the procedure for the election of members to the Board of Administration (the board).

Timeshare condominiums were previously exempt from these requirements under prior versions of the Condominium Act because they are not applicable to the procedures in common use by timeshare owners' associations. However, prior amendments to the Condominium Act inadvertently removed the exemption.¹

Effect of Proposed Changes

The bill amends s. 718.112(2)(d)4., F.S. to specifically exempt timeshare condominiums from the requirements related to condominium board member elections. The section now conforms to prior versions of the Condominium Act.²

Definition of "Timeshare Estate"

Current Situation

Currently, s. 721.05(34), F.S., defines a "timeshare estate" as "an interest in a cooperative unit pursuant to s. 719.103, or an interest in a trust that complies in all respects with the provisions of s. 721.08(2)(c)4., provided that the trust does not contain any personal property timeshare interests."

The statute does not specify whether this definition includes both direct and indirect interests in trusts. An example of an indirect interest in a trust is a trust beneficiary's spouse or other dependent.

Effect of Proposed Changes

The bill amends s. 721.05(34), F.S., to clarify that a "timeshare estate" includes an interest in a trust that complies in all respects with s. 721.08(2)(c)4., F.S., regardless of whether that interest is direct or indirect.

Reserves

¹ Prior to 2011, the board election provisions located in s. 718.112(2)(d)4., F.S., were located in s. 718.112(2)(d)3., F.S. In 2010, the provisions of SB 1196 split subparagraph 3. of s. 718.112(2)(d), F.S., into an introduction and two separate sub-subparagraphs. The language that stipulates that subparagraph 3. does not apply to timeshare condominium associations was relocated to sub-subparagraph 3.a., which references proxy procedures. No similar exemption language was included in the introductory subparagraph that references board election procedures.

In 2011, in response to concerns as to whether the proxy provisions apply to timeshare condominiums, the provisions of HB 1195 added subsection 10. to s. 718.112(2)(d), F.S., to clarify that the procedures regarding proxies do not apply to timeshare condominium associations. In order to reduce redundancy, this legislation also dropped the sub-subparagraph 3.a. exemption for timeshare condominiums. As such, there is currently no 'exemption' language remaining in s. 718.112(2)(d)4., F.S., as it relates to timeshare condominiums. This change has created uncertainty in the industry.

² For procedures and rules related to timeshare condominium unit owner meetings, see generally, s. 721.13, Florida Statutes.

Current Situation

Prior to offering any timeshare plan, the developer must submit a filed public offering statement to the Division of Condominiums, Timeshares and Mobile Homes for approval, which must include certain information and disclosures.³ Specifically, the filed public offering statement must include an estimated operating budget for the timeshare plan, and a schedule of the purchaser's expenses to be paid to the timeshare plan and the managing entity.⁴ A common expense to be paid to the managing entity is a reserve for deferred maintenance and capital expenditures.

Currently, s. 721.07(5)(t)3.a.(XI)(A), F.S., provides that reserves for timeshare plans must be calculated by a formula based upon the estimated life and replacement cost of each reserve item. This is also known as the 'straight-line accounting method.' Conversely, a second type of calculation formula, the 'pooling method,' is based upon the pooling of two or more assets. The pooling method is authorized to be used when calculating reserves for condominiums.⁵

Effect of Proposed Changes

The bill amends s. 721.07(5)(t)3.a.(XI)(A), F.S., to allow timeshare plan reserves to be calculated using the pooling accounting method. Reserves may still be calculated based on the straight line accounting method, if desired.

Definition of "Notice Address"

Current Situation

In order to institute trustee foreclosure proceedings, adequate notice must be provided to the mortgagor, the owner of the timeshare interest if different than the mortgagor, and any junior interestholder.⁶

Currently, s. 721.82(9), F.S., defines "notice address" as the address that is used in the books and records of the timeshare plan. However, a mortgagor, owner, or junior interestholder's current address may be different than the address used in the timeshare plan's books and records.

Effect of Proposed Changes

The bill creates s. 721.82(9)(d), F.S., to include as a "notice address," any address that is known to be the current address of a timeshare mortgagor, owner, or junior interestholder.

Definition of "Permitted Delivery Service"

Current Situation

Section 721.82(11), F.S., defines "permitted delivery service" as "any nationally recognized common carrier delivery service or international airmail service that allows for return receipt service." The current statutory language does not permit the trustee to use a foreign country's equivalent of certified, registered mail.

Effect of Proposed Changes

³ See, generally: ss. 721.07 and 721.07(5), Florida Statutes.

⁴ Section 721.07(5)(t)3., Florida Statutes.

⁵ See: 61B-22.005(3), Florida Administrative Code.

⁶ See, generally: ss. 721.855(5)(a) and 721.856(5)(a), Florida Statutes.

The bill amends s. 721.82(11), F.S., to also allow the trustee to use a foreign country's equivalent of certified, registered mail.

Title Searches

Current Situation

Currently, in order to initiate a trustee foreclosure proceeding against a timeshare interest, the lienholder must deliver an affidavit and a title search of the timeshare interest identifying junior lienholders.⁷ The title search must have been conducted within sixty days of the date of the affidavit.⁸

Effect of Proposed Changes

The bill amends ss. 721.855(2)(c)1. and 721.856(2)(b)1., F.S., to eliminate the requirement that the title search be conducted within sixty days of the date of the affidavit.

The bill creates ss. 721.855(4)(f) and 721.856(4)(g), F.S., to instead require that a title search be conducted and delivered to the trustee prior to the sale of the timeshare interest. The trustee may not exercise his or her power of sale of the timeshare interest until a title search has been conducted and delivered. Moreover, the title search must have been conducted within sixty days of the date that it is delivered to the trustee.

If incorrect obligors or junior interestholders were served or additional obligors or junior interestholders have not been served, the foreclosure action may not continue until the correct or additional notices have been served.

Recording of a Lis Pendens

Current Situation

A lis pendens has the effect of notifying potential claimants and interested parties of the action, and establishes a priority right against future claims. Current statutory language is unclear as to whether the initiation of a trustee foreclosure action operates as a lis pendens on the timeshare interest. This has caused confusion in the industry, as a trustee may not proceed with a sale if a lis pendens has been filed.⁹

Effect of Proposed Changes

The bill amends ss. 721.855(4)(c) and 721.856(4)(c), F.S., to clarify that the initiation of a foreclosure proceeding against a timeshare interest does not automatically act as a lis pendens.

The bill also creates ss. 721.855(5)(h) and 721.856(5)(h), F.S., to provide that the initiation of a trustee foreclosure action operates as a lis pendens on the timeshare interest if a notice of lis pendens is recorded in the county in which the deed conveying the timeshare interest to the obligor was recorded.

The notice of lis pendens must include:

- The name of the obligor;
- The date of the initiation of the trustee foreclosure action;
- The name and contact information of the trustee;
- The legal description of the timeshare interest; and
- A statement that a trustee foreclosure action has been initiated against the timeshare interest.

⁷ Sections 721.855(2)(c)1. and 721.856(2)(b)1., Florida Statutes.

⁸ Id.

⁹ Sections 721.855(4)(c) and 721.856(4)(c), Florida Statutes.

Permitted Delivery Service Typographical Error

Current Situation

Chapter 721, F.S., provides that giving notice by use of any “permitted delivery service” is an alternative to providing notice by the use of any “permitted delivery service.”¹⁰ The second use of “permitted delivery service” is duplicative, and is a typographical error.

Effect of Proposed Changes

The bill amends ss. 721.855(5)(a), 721.855(5)(a)4., 721.855(5)(b)1., 721.856(5)(a), 721.856(5)(a)4., and 721.856(5)(b)1., F.S., to eliminate the typographical error.

Standard for Trustee Ascertaining Signature

Current Situation

In foreclosure proceedings, the trustee is required to notify the obligor of the proceeding by sending a written notice of default and intent to foreclose to the obligor’s notice address.¹¹ Notice is not perfected if the trustee cannot ascertain whether the obligor is the person who signed the receipt of notice.¹²

A trustee who determines that the obligor signed the receipt, when he or she knows or should know that this determination is not correct, commits a third degree felony.¹³

Effect of Proposed Changes

The bill amends ss. 721.855(5)(a)5., 721.855(5)(b)1., 721.856(5)(a)5., and 721.856(5)(b)1., F.S., to provide a good faith standard in determining whether the obligor is the person who signed the receipt of notice. The bill also provides reasons for why the trustee may be unable to ascertain whether the obligor signed the receipt, including if all or a portion of the obligor’s name is not on the signed receipt, or if the trustee cannot otherwise determine that the obligor signed the receipt.

Moreover, the bill amends ss. 721.855(14)(b) and 721.856(13)(b), F.S., to provide that if the trustee, in good faith, makes an incorrect determination as to the identity of the signature on the notice receipt, it will not be a violation of law.

Published Notice of Default

Current Situation

As stated above, the trustee is required to notify the obligor of the foreclosure proceeding by sending a written notice of default and intent to foreclose to the obligor’s notice address.¹⁴

Sections 721.855(5)(a)1. and 721.856(5)(a)1., F.S., set forth the information that is required to be included in the notice of default and intent to foreclose, including:

- The identity of the obligor;
- The notice address of the obligor;

¹⁰ See: ss. 721.855(5)(a), 721.855(5)(a)4., 721.855(5)(b)1., 721.856(5)(a), 721.856(5)(a)4., and 721.856(5)(b)1., Florida Statutes.

¹¹ Sections 721.855(5)(a) and 721.856(5)(a), Florida Statutes.

¹² Sections 721.855(5)(a)5. and 721.856(5)(a)5., Florida Statutes.

¹³ Sections 721.855(14)(b) and 721.856(13)(b), Florida Statutes.

¹⁴ Sections 721.855(5)(a) and 721.856(5)(a), Florida Statutes.

- The legal description of the timeshare interest;
- The nature of the default;
- The amounts secured by the lien;
- A per diem amount to account for further accrual of the amounts secured by the lien; and
- The method by which the obligor may cure the default, including the period of time within which the obligor may cure the default.

Notice is perfected when the trustee receives the return receipt of notice bearing the signature of the obligor or junior interestholder within thirty calendar days after the notice was sent.¹⁵ In some instances, notice by permitted delivery service is not perfected and notice by publication is appropriate.¹⁶ Unlike with the “standard” notice of default procedure, the current statutory language does not delineate what information must be included in the publication notice. As a result, there is confusion in the industry as to how much and what information is to be included in the publication notice.

Effect of Proposed Changes

The bill amends ss. 721.855(5)(c) and 721.856(5)(c), F.S., to delineate what information is to be included in the publication notice. Specifically, the notice of default and intent to foreclose by publication shall identify:

- The obligor;
- The notice address of the obligor;
- The legal description of the timeshare interest;
- The nature of the action in short and simple terms;
- The name and contact information of the trustee; and
- The period of time within which the obligor may cure the default.

Affidavit of Publication Notice Typographical Error

Current Situation

Sections 721.855(5)(e) and 721.856(5)(e), F.S., list which information is to be included in the affidavit certifying perfected notice.

Specifically, the information to be included is:

- The nature of the notice;
- The dates on which the notice was mailed;
- The name and address on the envelopes containing the notice;
- The manner in which the notices were mailed;
- The fact that a signed receipt from the certified mail, registered mail, or permitted delivery service was timely received; and
- The name and address on the envelopes containing the notice.

The second use of “the name and address on the envelopes containing the notice” is duplicative, and is a typographical error.

Effect of Proposed Changes

The bill amends ss. 721.855(5)(e) and 721.856(5)(e), F.S., to eliminate the typographical error.

Affidavit of Publication Notice

¹⁵ Sections 721.855(5)(a)5. and 721.856(5)(a)5., Florida Statutes.

¹⁶ See, generally: ss. 721.855(5)(c) and 721.856(5)(c), Florida Statutes.

Current Situation

As stated above, in a timeshare interest foreclosure proceeding, the trustee is required to notify the obligor of the proceeding by sending a written notice of default and intent to foreclose to the obligor's notice address.¹⁷ Notice is perfected when the trustee receives the return receipt of notice bearing the signature of the obligor or junior interestholder within thirty calendar days after the notice was sent.¹⁸

Notice is not perfected, and notice by publication is appropriate, when:

- Notice is returned as undeliverable within thirty calendar days after the trustee sent the notice;
- The trustee cannot ascertain who signed the receipt of notice; or
- The receipt of notice is returned or refused within thirty calendar days after the trustee sent the notice.¹⁹

If the notice is returned as undeliverable within thirty calendar days after the trustee sent the notice, the trustee is obligated to conduct a diligent search and inquiry to determine a different address for the obligor or junior interestholder.²⁰ If the trustee's diligent search and inquiry produces an address different from the notice address, the trustee must attempt to perfect notice at the new address before attempting to perfect notice by publication.²¹ However, the diligent search and inquiry is only required to be conducted the first time that the notice is returned as undeliverable; any subsequent time that the notice is returned as undeliverable, the trustee may proceed with notice by publication.

As with other forms of notice perfection, a trustee who perfects notice by publication is required to prepare an affidavit setting forth the manner in which notice was perfected.²² Among other things, the affidavit must include a statement that a diligent search and inquiry was made for the current address for the person. This is potentially confusing, as a diligent search and inquiry may not always be required for notices perfected by publication.

Effect of Proposed Changes

The bill amends ss. 721.855(5)(f) and 721.856(5)(f), F.S., to clarify that attestation that a diligent search and inquiry was done is only required if a diligent search and inquiry was specifically required to be conducted by the provisions in ch. 721, F.S.

The bill does not affect any requirements set forth by ss. 49.041 or 49.051, F.S., as applicable.

Perfection of Service at Same Address

Current Situation

Current statutory language does not provide trustees with the ability to perfect notice as to multiple obligors residing at the same address, with the same service of notice.²³ Instead, notice must be perfected as to each obligor separately, regardless of whether multiple obligors reside at the same address.

Effect of Proposed Changes

The bill creates ss. 721.855(5)(g) and 721.856(5)(g), F.S., that allows for notice to be perfected as to all obligors at the same address, so long as notice is perfected as to at least one obligor at that address.

¹⁷ Sections 721.855(5)(a) and 721.856(5)(a), Florida Statutes.

¹⁸ Sections 721.855(5)(a)5. and 721.856(5)(a)5., Florida Statutes.

¹⁹ *Id.*

²⁰ Sections 721.855(5)(b) and 721.856(5)(b), Florida Statutes.

²¹ Sections 721.855(5)(b)1. and 721.856(5)(b)1., Florida Statutes.

²² See, generally: ss. 721.855(5)(f) and 721.856(5)(f), Florida Statutes.

²³ See, generally: ss. 721.855(5) and 721.856(5), Florida Statutes.

Manner of Sale

Current Situation

Pursuant to ss. 721.855(7)(b) and 721.856(7)(b), F.S., the trustee shall conduct the foreclosure sale of the timeshare interest, and shall act as the auctioneer. The current statutory language does not permit anyone other than the trustee to conduct the sale or act as the auctioneer.

Effect of Proposed Changes

The bill amends ss. 721.855(7)(b) and 721.856(7)(b), F.S., to allow the trustee to use a third party to conduct the sale on behalf of the trustee. However, the trustee remains liable for the conduct of the sale, including the actions of any third party auctioneer.

B. SECTION DIRECTORY:

Section 1: amends s. 718.112(2)(d)4., F.S., to exempt timeshare condominiums from the requirements related to condominium board member elections.

Section 2: amends s. 721.05(34), F.S., to clarify that a “timeshare estate” includes both a direct and an indirect interest in a trust.

Section 3: amends s. 721.07(5)(t)3.a.(XI)(A), F.S., to allow reserves to be calculated by the pooling accounting method.

Section 4: amends s. 721.82(9)(d), F.S., to include known, current addresses of timeshare plan mortgagors, owners, and junior interestholders in the definition of “notice address;” and amends s. 721.82(11), F.S., to allow the trustee to use another country’s equivalent of certified, registered mail.

Section 5: amends s. 721.84(6), F.S., to make technical changes.

Section 6: amends s. 721.855(2)(c)1., F.S., to eliminate the requirement that a title search be conducted in order to initiate a foreclosure proceeding; amends s. 721.855(4)(c), F.S., to clarify that no lis pendens is automatically recorded against a timeshare interest; creates s. 721.855(4)(f), F.S., to require that a title search be conducted and delivered to the trustee prior to the sale of the timeshare interest; amends ss. 721.855(5)(a), 721.855(5)(a)4., 721.855(5)(b)1., and 721.855(5)(e), F.S., to eliminate typographical errors; amends ss. 721.855(5)(a)5., and 721.855(5)(b)1., F.S., to provide a good faith standard in determining whether the obligor is the person who signed the receipt of notice; amends s. 721.855(5)(c), F.S., to delineate what information is to be included in the publication notice; amends s. 721.855(5)(f), F.S., to clarify that attestation that a diligent search and inquiry was done is only required if a diligent search and inquiry is statutorily required to be conducted; creates s. 721.855(5)(g), F.S., to allow for notice to be perfected as to all obligors at the same address; creates s. 721.855(5)(h), F.S., to provide a procedure for filing a lis pendens in relation to the initiation of a foreclosure proceeding; amends s. 721.855(7)(b), F.S., to allow the trustee to use a third party to conduct the foreclosure sale on behalf of the trustee; and amends s. 721.7855(14)(b), F.S., to provide that if the trustee, in good faith, makes an incorrect determination as to the identity of the signature on the notice receipt, it will not be a violation of law.

Section 7: amends s. 721.856(2)(b)1., F.S., to eliminate the requirement that a title search be conducted in order to initiate a foreclosure proceeding; amends s. 721.856(4)(c), F.S., to clarify that no lis pendens is automatically recorded against a timeshare interest; creates s. 721.856(g), F.S., to require that a title search be conducted and delivered to the trustee prior to the sale of the timeshare interest; amends ss. 721.856(5)(a), 721.856(5)(a)4., 721.856(5)(b)1., and 721.856(5)(e), F.S., to eliminate typographical errors; amends ss. 721.856(5)(a)5., and 721.856(5)(b)1., F.S., to provide a

good faith standard in determining whether the obligor is the person who signed the receipt of notice; amends s. 721.856(5)(c), F.S., to delineate what information is to be included in the publication notice; amends s. 721.856(5)(f), F.S., to clarify that attestation that a diligent search and inquiry was done is only required if a diligent search and inquiry is statutorily required to be conducted; creates s. 721.856(5)(g), F.S., allowing for service to be perfected as to all obligors at the same address; creates s. 721.856(5)(h), F.S., to provide a procedure for filing a lis pendens in relation to the initiation of a foreclosure proceeding; amends s. 721.856(7)(b), F.S., to allow the trustee to use a third party to conduct the foreclosure sale on behalf of the trustee; and amends s. 721.856(13)(b), F.S., to provide that if the trustee, in good faith, makes an incorrect determination as to the identity of the signature on the notice receipt, it will not be a violation of law.

Section 8: provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill works to clarify existing statutory provisions and to conform the Florida Vacation Plan and Timesharing Act to common industry practices so as to improve ease of use.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenues in the aggregate, nor reduce the percentage of sales tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Rule 61B-40.006, F.A.C., will need to be amended in order to address the changes to s. 721.07, F.S., relating to reserve calculations using the pooling accounting method.

The bill provides adequate rulemaking authority and sufficient guidance to the Department of Business and Professional Regulation.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES